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No. 86-2024

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1987

DAVID GLEN MEYERS, et al., Petitioners,

v.

CONTRA COSTA COUNTY DEPARTMENT OF SOCIAL SERVICES, et al., Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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June 10, 1987

QUESTIONS PRESENTED

1. Whether a social worker performing duties connected with the initiation of child dependency proceedings is entitled to absolute immunity in a suit for compensatory damages under 42 U.S.C. Section 1983?

2. Whether a social worker, who ordered a father to stay away from the family residence prior to the initiation of child dependency proceedings, is entitled to qualified immunity?

3. Whether a United States District Court is required to liberally construe a complaint brought under the Civil Rights Act, as alleging not only procedural but also substantive due process deprivations before dismissing it?

4. Whether Family Conciliation Court counselors, who willfully violated court orders, are entitled to absolute judicial immunity in a suit for compensatory damages under 42 U.S.C. Section 1983?

[Note: Petitioners reserve the right to argue Question 5 in the event certiorari is granted on the above questions, but do not include Question 5 among the reasons for the grant of certiorari.

5. Does a court of appeals abuse its discretion in affirming dismissal of a complaint brought under 42 U.S.C. Section 1983 where it is unclear whether the complaint could have been saved by any amendment?

LIST OF PARTIES

The parties to the proceedings below were the petitioners David Glen Meyers, his children, Paul David Meyers, Matthew Christopher Meyers and Angela Jennifer Meyers, and his parents, George Albert Meyers and Georgia Ann Meyers and the respondents, Harold Haaland, Kay Crossley, Agnes H. Allison and the Contra Costa County Department of Social Services.

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1987

DAVID GLEN MEYERS, PAUL DAVID MEYERS, MATTHEW CHRISTOPHER MEYERS, ANGELA JENNIFER MEYERS, GEORGE ALBERT MEYERS, and GEORGIA ANN MEYERS, Petitioners,

v.

HAROLD HAALAND, KAY CROSSLEY, AGNES H. ALLISON and CONTRA COSTA COUNTY DEPARTMENT OF SOCIAL SERVICES, Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

The Petitioners David Glen Meyers, Paul David Meyers, Matthew Christopher Meyers, Angela Jennifer Meyers, George Albert Meyers and Georgia Ann Meyers respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit, entered in the above-entitled proceeding on March 16, 1987.

OPINIONS BELOW

The opinion of the Court of Appeals for the Ninth Circuit is reported at 812 F.2d 1154, and is reprinted in the appendix hereto, p. 1a, infra.

The memorandum decision of the United States District Court for the Northern District of California (Patel, D.J.) has not been reported. It is reprinted in the appendix hereto, p. 27a, infra.

JURISDICTION

Invoking federal jurisdiction under 42 U.S.C. Section 1983, the petitioners brought this suit in the Northern District of California. On May 6, 1985, the Northern District granted the respondents' motions to dismiss. See p. 29a, infra.

On petitioners' appeals, the Ninth Circuit on March 16, 1987, entered a judgment and an opinion affirming the Northern District's

order in all respects. See p. 6 a, infra. No petition for rehearing was sought.

The jurisidiction of this Court to review the judgment of the Ninth Circuit is invoked under 28 U.S.C. Section 1254 (1).

STATUTE INVOLVED

This case involves 42 U.S.C. Section 1983:

"Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress."

STATEMENT OF THE CASE

Petitioners, David Meyers, his children, Paul, Matthew and Angela, and his parents, George and Georgia Meyers, brought this civil rights action for damages under 42 U.S.C. Section 1983 against David's former wife, Amy, and numerous individual and governmental defendants. The complaint alleged that the defendants conspired, under color of state law and without due process of law, to prevent the adult petitioners from associating with the minor petitioners, thereby depriving them of a liberty interest. Having jurisidiction pursuant to 42 U.S.C. Section 1983 and 28 U.S.C. Section 1343(3), the District Court dismissed as to all defendants. Petitioners appealed only the dismissals as to the respondents herein: Haaland, a social caseworker specialist employed by the Department of Social Services in its Children's Protective Services

Unit, 1/ Allison an associate counselor, and Crossley, a supervising counselor, both employed by the Family Conciliation Court and the Contra Costa County Department of Social Services (DSS). The Ninth Circuit affirmed the District Court's order in all respects.

1. Haaland

The complaint alleges that on October 8, 1981, Amy and Haaland entered into a conspiracy to deprive David of custody of their children. After Amy made false allegations to Haaland that David had molested one of their children, Paul, Haaland embarked on a course of conduct designed to separate David from his children.

1/ Department of Social Service workers are assigned the duties of probation officers with respect to minors alleged or adjudged to be dependent children as described by California Welfare and Institutions Code Section 300 (West 1984). Cal. Welf. & Inst. Code Section 202.5 (West 1984).

To begin with, Haaland commenced and supervised an investigation which involved Richmond and San Pablo police officers. Then, on October 23, after David had informed Haaland that the San Pablo Police Department had terminated its investigation for lack of evidence and that he was going home to see his children, Haaland ordered David to stay away from his home until a judicial hearing took place on October 26. David obeyed Haaland's order.

On October 26, Haaland filed verified dependency petitions which contained false and unsubstantiated allegations of child abuse. Based solely on the petitions, the Juvenile Court Referee ordered that the children be detained in Amy's custody.

Although the Referee made no rulings as to visitation, Haaland stated at the hearing that he would assume jurisdiction and control over supervised visitation between

David and his children. Haaland permitted only one one-hour visit that day. Despite David's repeated requests, no other visits were allowed. The dependency proceeding was continued until November 17, at which time the petition was dismissed pursuant to Haaland's recommendation. Haaland's role in the matter eventually ended in 1982.

2. Allison and Crossley

The complaint alleges that during the fall of 1977, Amy, David and his parents participated in a series of voluntary counseling sessions conducted by Allison under auspices of the Family Conciliation Court, and that during these sessions Allison became biased against the adult petitioners. Allison's bias grew following a series of meetings with Amy, during which she conspired with Amy to deprive David of custody of his children. These meetings occurred some time

during the latter half of 1981, but before October 8, 1981. Although Amy made false accusations of child abuse to Allison during these meetings, Allison willfully failed to discuss them with David or to otherwise investigate them.

On November 16, David and Amy attended a mandatory conciliation session with a Family Conciliation Court counselor. Although the case was not initially assigned to Allison, upon learning of the parties' indentities, she induced Crossley to reassign the case to her in spite of her bias against the adult petitioners.

Petitioners further claim that from November 19, 1981, through January 29, 1982, Allison, acting in concert with Amy, refused to arrange for visitation in willful violation of a court order requiring her to do so. Additionally, after the court had

awarded temporary custody to foster parents and stressed the importance of their neutrality, Crossley and Allison visited the foster parents on April 7, 1982, and, in willful violation of the court order, attempted to induce them to refuse David and his parents the right to see the children. David eventually was awarded custody in January 1984.

3. DSS

The complaint alleged that Haaland's actions were not only carried out in furtherance of the conspiracy with Amy, but also pursuant to the policies, regulations and customs of DSS. Such policies include crediting all allegations of child abuse regardless of the circumstances. The complaint accordingly alleged that Haaland acted pursuant to official policies in conclusory terms, the details being left to pretrial discovery.

The respondents moved to dismiss the complaint for failure to state a claim upon which relief can be granted (Rule 12(b)(6), Fed.R.Civ.P.), or in the alternative for summary judgment (Rule 56, Fed.R.Civ.P.). The District Court granted respondents' motions to dismiss, holding the petitioners failed to allege that the deprivation of their liberty interest, under color of state law, had occurred without due process as required by Parratt v. Taylor, 451 U.S. 527 (1981). The court applied Parratt because (p. 41a-42 a, infra):

> [A] close reading of the first count of the complaint indicates that it is not the policies themselves that are alleged to give rise to the constitutional deprivations.... Rather, the complaint states that various unauthorized actions were committed by the named defendants in furtherance of an alleged conspiracy to deprive plaintiffs of custody of the children.

The District Court found that the post-

deprivation remedies available to petitioners, namely the October 26 and November 17 dependency proceedings, the custody proceedings and the state contempt procedures, satisfied due process. See p. 42a-46a infra. The court, relying on Hutchinson v. United States, 677 F.2d 1322 (9th Cir. 1982), further held that petitioners' conclusory allegations were insufficient to state claims under 42 U.S.C. Section 1983. See p. 47a, infra.

Assuming arguendo that the complaint was sufficient, the District Court, impressed with the discretion afforded Haaland in the performance of his functions, found that his duties resembled those of a prosecutor. The court thus held that Haaland was entitled to absolute immunity for all of his actions. See p. 54a, infra. The District Court also granted Allison and Crossley absolute immunity because, as officers of the court,

they were entitled to quasi-judicial immunity. See p. 49a-50a, infra.

With respect to DSS, the court, citing Rizzo v. Goode, 423 U.S. 362, 371 (1976), found that the complaint was insufficient, and stated (p. 56a, infra.):

> [P]laintiffs do not allege that Haaland acted pursuant to an official policy that all allegations of sexual abuse be credited regardless of the circumstances. ...Plaintiffs have not shown an "affirmative link" between the occurrence of misconduct and the policy or custom at issue.

The District Court dismissed the claim without leave to amend.

Having jurisdiction under 28 U.S.C. Section 1291, a Ninth Circuit panel, consisting of Judges Schroeder, Canby and Boochever, affirmed the District Court's decision in all respects. Assuming, without discussion, that the complaint was sufficient to state a cause of action under 42 U.S.C. Section 1983 with regard to Haaland, Allison

and Crossley, the court only addressed the absolute immunity issue.

In accord with the District Court, the Ninth Circuit granted Haaland absolute immunity because of his quasi-prosecutorial functions. See p. 12a-13a, infra. The court further determined that policy considerations supported such an extension of absolute immunity. See p. 12a-13a infra.

However, unlike the District Court, Ninth Circuit declared that Haaland's ordering David away from his home on October 23, prior to the initiation of the dependency proceeding, was neither an advocatory nor a judicial action, and thus granted him only qualified immunity. The court then found that Haaland's conduct on October 23 did not violate clearly established statutory or constitutional rights as required by Harlow v. Fitzgerald, 45 U.S. 800 (1982).

See p. 20a, infra.

Agreeing with the District Court, the Ninth Circuit held that Allison and Crossley enjoyed quasi-judicial immunity. The court added that although they allegedly violated court orders, they were still entitled to absolute immunity because such actions were not "clearly and completely outside the scope of [their] jurisdiction" (quoting Demoran v.Witt, 781 F.2d 155, 158 (9th Cir. 1985))(p. 23a-24a, infra).

Judge Boochever dissented in part, finding that petitioners had stated sufficient allegations of deprivation of statutory and constitutional parental rights by Haaland and that resolution of the factual issues involved in a qualified immunity defense was necessary. See 26a, infra.

REASONS FOR GRANTING THE WRIT

I.

The Ninth Circuit's decision to extend absolute immunity to a social worker in the performance of his duties connected with the initiation of child dependency proceedings conflicts in approach with Court precedent and raises important and reoccurring problems.

Without congressional authorization or basis in common law, the Ninth Circuit has made the absolute immunity defense available to a new class of state officials — social workers. By analogizing a social worker's duties to those of a prosecutor and relying on the policy considerations used to justify prosecutorial immunity, the court has given itself the discretion to limit the relief available in Section 1983 litigation. Such an extension of the absolute immunity doctrine deserves this Court's attention.

The Ninth Circuit's grant of absolute immunity to a social worker conflicts in

approach with Malley v. Briggs, 475 U.S. ___, 106 S. Ct. 1092 (1986). In Malley, this Court held that a state police officer whose request for a warrant allegedly caused an unconstitutional arrest was not entitled to the same absolute immunity enjoyed by a prosecutor, but rather only qualified immunity. In doing so, the Court confirmed:

> Our general approach to questions of immunity under Section 1983 is by now well established.
> ...Our initial inquiry is whether an official claiming immunity under Section 1983 can point to a common-law counterpart to the privilege he asserts. If "an official was accorded immunity from tort actions at common law when the Civil Rights Act was enacted in 1871, the Court next considers whether Section 1983's history or purposes nonetheless counsel against recognizing the same immunity in Section 1983 actions." (citations omitted) (quoting Tower v. Glover, 467 U.S. 914, 920 (1984)) [106 S. Ct. at 1095].

Contrary to the above approach, in considering Haaland's conduct of filing dependency petitions containing false and

unsubstantiated allegations of child abuse, the Ninth Circuit did not inquire as to the scope of immunity afforded social workers at common law. Perhaps this was so because there was no such social service position in 1871, and thus no immunity for social workers at common law.2/ Given that social workers had no true common-law counterpart, there is no common law basis for granting them absolute immunity.

The Ninth Circuit impliedly followed the functional approach to the immunity issue, as recognized in Harlow v. Fitzgerald, 457 U.S. 800, 810 (1982), and concluded that "[a]lthough child service workers do not initiate criminal proceedings, their responsibility for bringing dependency proceedings, ... is not very different from the responsibility of a criminal prosecutor"

2/The first social service agencies were created in the United States in the 1930's. Rupp v. Bryant, 417 So.2d 658, 662 (1982).

(p. 12a, infra). Although other courts have reached this same conclusion, 3/ the Ninth Circuit's reasoning is at odds with In re C., 9 Cal. App. 3d 255 (1970). There, the California Court of Appeals analyzed the probation officer's role in initiating a dependency proceeding and stated:

> The probation officer does not act as a district attorney since a proceeding in the juvenile court is not deemed a criminal proceeding nor a proceeding designed to punish the minor, but one to supplant parental supervision.
> ... [I]t is clear to us that the role of the probation officer in juvenile court proceedings is not one in the context of an adversary-advocate, but a role in which he acts as the arm of the court in the best interests of the minor. (citations omitted) [9 Cal. App. 3d at 265].

3/ The Sixth Circuit also granted the social workers absolute immunity in Kurzawa v. Mueller, 732 F.2d 1456, 1458 (6th Cir. 1984). However, it is not clear whether the court did so based on quasi-judicial or quasi-prosecutorial immunity. See also, Whelehan v. County of Monroe, 558 F. Supp. 1093, 1098-99 (W.D.N.Y. 1983); Pepper v.Alexander, 599 F. Supp. 523, 526-27 (D.N.M. 1984).

According to the court of appeals then, a social worker's role is not advocatory, and thus is not functionally comparable to that of a prosecutor.

Additionally, the Ninth Circuit determined that such an extension of absolute immunity is justified by policy considerations. According to the court, social workers must be allowed to exercise their discretion in initiating dependency proceedings without fear of personal liability. However, the Ninth Circuit's reasoning conflicts in approach with Tower v. Glover, 467 U.S. 914 (1984). In Tower, this Court refused to extend absolute immunity to state public defenders who allegedly conspired to deprive their clients of federal constitutional rights, and in so doing explained:

> We do not have a license to establish immunities from Section 1983 actions in the interest of what we judge to be sound

> public policy. It is for Congress to determine whether Section 1983 litigation has become too burdensome to state and federal institutions and, if so, what remedial action is appropriate. [467 U.S. at 922-23].

Given that Congress has not extended absolute immunity to social workers, the Ninth Circuit's assertion of the authority to do so clearly conflicts with Court precedent. Moreover, other courts have found the qualified immunity defense sufficient for social workers.[4/]

4/ Duchesne v. Sugarman, 566 F.2d 817, 833 (2d Cir. 1977); Doe v. County of Suffolk, 494 F.Supp. 179, 183 (E.D.N.Y. 1980); In re Scott County Master Docket, 618 F. Supp. 1534, 1565-67 (D.Minn.1985); Czikalla v. Malloy, No. 86-K-777, slip op. at 6 (D. Colo. Dec. 8, 1986).

II.

The Ninth Circuit's decision that a social worker is entitled to qualified immunity because his act of ordering a father to stay away from the family residence did not violate clearly established statutory or constitutional rights conflicts in principle with Court precedent.

The Ninth Circuit found that Haaland was entitled to only qualified immunity for his actions occurring before the initiation of the dependency proceedings. In applying Harlow, 457 U.S. at 818, the court decided that Haaland's act of ordering David to stay away from the family residence did not violate clearly established statutory or constitutional rights because he did not physically interfere with custody and because social workers have broad general authority to protect children. Not only is such reasoning inconsistent with California

law, 5/ it leads to a conclusion which conflicts with Court precedent.

This Court has often acknowledged the existence of a protected liberty interest under the Fourteenth Amendment in keeping one's family unit together. Santosky v. Kramer, 455 U.S. 745 (1982). The Court in Smith v. Organization of Foster Families for Equality and Reform, 431 U.S. 816 (1977), added:

> There does exist a 'private realm of family life which the state cannot enter', that has been afforded both substantive and procedural protection. (citations omitted) (quoting Prince v. Massachusetts, 321 U.S. 158, 166 (1944)) (emphasis added) [431 U.S. at 842].

5/ The court cites California Welfare and Institutions Code Section 16501 (West 1980) as support for the proposition that social workers have broad general authority in protecting children. However, nowhere does the Code authorize a social worker to use his official position to exert control over a parent.

In concluding that Haaland's conduct did not violate clearly established constitutional rights, the Ninth Circuit failed to consider petitioners' independent substantive due process right to remain together as a family without the coercive interference of the state. The doctrine of substantive due process protects individuals against "actions which governmental officials may not take no matter what procedural protections accompany them." Hudson v.Palmer, 468 U.S. 517, 541 n. 4 (1984) (Separate opinion of Justice Stevens). Such actions are justified only by compelling state interests. Since Haaland's interference was not justified by a compelling state interest, it was unconstitutional.

The Ninth Circuit reasoned that petitioners' rights were not violated because Haaland did not physically interfere with custody. Although his conduct may not be

comparable to that which shocked the Court's conscience in Rochin v. California, 342 U.S. 165 (1952), it does go to the heart of the due process clause. As stated in Daniels v. Williams, 474 U.S.__, 106 S. Ct. 662, 665 (1986), the due process clause was intended to "prevent governmental power from being 'used for purposes of oppression'" (quoting Murray's Lessee v. Hoboken Land & Improvement Co., 59 U.S. 272, 277 (1856)).

Here, Haaland's act of ordering David to stay away from the family residence constituted an abuse of authority. Even though David did not legally have to obey Haaland's order, he did so because of Haaland's power to temporarily disrupt and sever his relationship with his children. The due process clause was meant to protect parents against such misuse of power.

The Ninth Circuit's decision permits a

social worker to abuse his official position to exert control over a parent. If left to stand, the sanctity of the family which the Court has so frequently and fervently emphasized will be jeopardized.

III.

The District Court's failure to liberally construe the complaint as alleging both substantive and procedural due process deprivations before dismissing it conflicts in approach with decisions of other Circuits and Ninth Circuit panels.

Other Circuits clearly agree that complaints brought under the Civil Rights Act are to be liberally construed. 6/ Ninth Circuit cases too have so held.7/

Moreover, Morrison v. Jones, 607 F.2d 1269, 1276 (9th Cir.), cert. denied, 445 U.S. 962 (1979), is precisely on point. In Morrison, a Ninth Circuit panel reversed the district court's dismissal of plaintiff's complaint because the lower court had failed to liberally construe it. In so doing the

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6/See, e.g., Ryland v. Shapiro, 708 F.2d 967, 971 (5th Cir. 1983); Nickens v. White, 536 F.2d 802, 803 (8th Cir. 1976); Roberts v. Acres, 495 F.2d 57, 59 (7th Cir. 1974); Birnbaum v. Trussell, 347 F.2d 86, 90 (2d Cir. 1965).

7/ Thomas v. Younglove, 545 F.2d 1171, 1172 (9th Cir. 1976); Marshall v. Sawyer, 301 F.2d 639, 647 (9th Cir. 1962).

court stated:

> At this preliminary stage of the proceedings, we cannot say that plaintiff has failed to state a claim for relief based upon her constitutionally secured rights to procedural due process of law and her substantive familial rights that have long been considered the 'basic civil rights of man.' (quoting Skinner v. Oklahoma, 316 U.S. 535, 541 (1942))(emphasis added) [607 F.2d at 1276].

In conflict with the above approach, the District Court in the instant case, read the complaint as alleging only procedural due process deprivations. The court, relying on Parratt v. Taylor, 451 U.S. 527 (1981), then dismissed the complaint, finding that adequate post-deprivation remedies were available.

However, had the District Court liberally construed the complaint as alleging not only procedural but also substantive due process violations, Parratt would not have been dispositive. In Hudson, 468 U.S. 517 (1984), Justice Stevens, joined by three other

justices, agreed that Parratt required dismissal of the Section 1983 action, but added in footnote 4, "I do not understand the Court's holding to apply to conduct that violates a substantive constitutional right ...." 468 U.S. at 451. Other Circuits have followed Justice Steven's view and held that Parratt does not apply to substantive due process deprivations. 8/ Recently, a Ninth Circuit panel reached the same conclusion in Rutherford v. City of Berkeley, 780 F.2d 1444, 1447 (9th Cir. 1986). Thus, because the District Court failed to liberally construe the complaint, petitioners were denied a chance to prove their case.

8/See, e.g., McClary v. O'Hare 786 F.2d 83, 86, n.3 (2d Cir. 1986); Wilson v. Beebe, 770 F.2d 578, 585 (6th Cir. 1985); Augustine v. Doe, 740 F.2d 322, 326 (5th Cir. 1984); Wolf-Lillie v. Sonquist, 699 F.2d 864, 872 (7th Cir. 1983).

IV

The Ninth Circuit's decision to extend absolute immunity to the Family Conciliation Court counselors' conduct of willfully violating a court order and instruction conflicts in approach with Court precedent and the decisions of other Circuits and Ninth Circuit panels.

In Stump v. Sparkman, 435 U.S. 349 (1978), this Court firmly established that judges and those performing judge-like functions are absolutely immune from 42 U.S.C 1983 liability for acts performed in their official capacities. 9/ As pointed out by Justice Blackmun in Cleavinger v. Saxner, __ U.S._, 106 S. Ct. 496, 501 (1985), this Court has followed a "functional" approach to immunity law. As explained in Butz v. Economu, 438 U.S. 478, 511 (1978), those entitled to absolute immunity have it "because of the special nature of their

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9/ Applied to nonjudicial officials then, absolute judicial immunity is termed quasi-judicial immunity.

responsibilities" rather than "because of their particular location within the Government." Thus, when a court official acts in a capacity in which he is not called upon to exercise judicial or quasi-judicial discretion, he is not entitled to quasi-judicial immunity, "regardless of any apparent relationship of his role to the judicial system." McCray v. State of Maryland, 456 F.2d 1, 3-4 (4th Cir. 1972).

In accord with Court precedent, the Circuits have applied the "functional comparability" test to various court officials and have decided that the degree of immunity depends on the action taken and the judicial or quasi-judicial discretion involved therein. The Circuits have thus held that court clerks, for example, are entitled to absolute immunity for the performance of discretionary functions, and only qualified immunity for actions taken

pursuant to their lawful duties.[10] Other Ninth Circuit panels have applied the "functional comparability" test to court officials in the same manner.[11]

Additionally, the Circuits have allowed court officials to assert a closely related defense, referred to as derivative immunity. This defense affords absolute immunity to all public officials who act in obedience to a

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10/ See, e.g., McCray v. State of Maryland, 456 F.2d at 3-4 (qualified immunity for filing papers negligently); McLallen v. Henderson, 492 F.2d 1298, 1299-1300 (8th Cir. 1974)(dictum)(qualified immunity for ministerial duties); Williams v. Wood, 612 F.2d 982, 984-85 (5th Cir. 1980) (qualified immunity for failing to notify parties of entry of final judgment).

11/ See, e.g., Demoran v. Witt, 781 F.2d 155, 158 (9th Cir. 1986) (probation officers providing pre-sentencing reports enjoy quasi-judicial immunity); Richardson v. Koshiba, 693 F.2d 911, 914-15 (9th Cir. 1982)(Judicial Selection Committee, although an arm of the court, granted only qualified immunity); Sellars v. Procunier, 641 F.2d 1295, 1303 (9th Cir.), cert. denied, 454 U.S. 1102 (1981)(parole board officials perform judge-like roles and thus enjoy quasi-judicial immunity).

judicial order or under the court's direction. Lockhart v. Hoenstine, 411 F.2d 455, 460 (3d Cir.), cert. denied, 396 U.S. 941 (1969).

In considering the application of the above defenses to court officials, the Circuits have held that no immunity of any type is available where the official disobeys a court order or exceeds his lawful authority. See, e.g., McCray v. State of Maryland, F.2d at 5 (no immunity for clerk acting in direct violation of his statutory duties). Other Ninth Circuit panels, too, have reached this same conclusion. In Hoffman v. Halden, 268 F.2d 280, 300 (9th Cir. 1959), a Ninth Circuit panel observed that "[o]bvioulsy no immunity should be granted to the officials who wilfully disobeyed an order of the court." See also, Donovan v. Reinbold, 433 F.2d 738, 744 (9th Cir. 1970) (no immunity for city attorneys

who advised city to disobey an administrative order).

Contrary to the "functional" approach employed by the Court, other Circuits and Ninth Circuit panels, the court in the instant case held that Allison and Crossley were entitled to quasi-judicial immunity, despite their violation of a court order and instruction, simply because they were court officers. The court's failure to analyze the judicial or quasi-judicial discretion entailed in the counselors' statutory duties and, in particular, their duty to obey court orders and instructions, demonstrates a misunderstanding about the application of and policy behind quasi-judicial immunity. According to the Ninth Circuit's reasoning in this case, all court attachés enjoy absolute immunity, regardless of the discretion involved in the function performed or the

action taken. Such a result undermines the reasons for the creation of the absolute immunity shield and establishes a confusing precedent, likely to generate even further confusion among the lower courts. It is an approach to immunity law which conflicts with Court precedent and the decisions of other Circuits and Ninth Circuit panels. Plenary consideration of the matter by this Court is essential.

CONCLUSION

For these various reasons, this petition for certiorari should be granted. Petitioners reiterate that Question 5 is presented herein, not as a reason for granting certiorari, but because this is the only opportunity for petitioners to seek review of the Ninth Circuit's ruling that petitioners' Section 1983 complaint should be dismissed for failure to state a claim upon which relief can be given.

Respectfully submitted,

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June 10, 1987

Supreme Court, U.S.
FILED
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JOSEPH F. SPANIOL, JR.
CLERK

No. 86-2024

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1987

DAVID GLEN MEYERS, et al., Petitioners,

v.

CONTRA COSTA COUNTY DEPARTMENT OF SOCIAL SERVICES, et al., Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

APPENDIX

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Memorandum Decision of
District Court 27a

David Glen MEYERS, et al.,

Plaintiffs-Appellants

v.

CONTRA COSTA COUNTY DEPARTMENT

OF SOCIAL SERVICES, et al.,

Defendant-Appellees.

No. 85-2127

United States Court of Appeals,

Ninth Circuit.

Argued and Submitted March 11, 1986.

Decided March 16, 1987.

Father, his children and his parents brought civil rights action against various parties, including social service workers, court employees and county department of social services based on their actions during dependency proceeding. The United States District Court for the Northern District of California, Marilyn H. Patel, J.,

granted defendants' motion to dismiss, and plaintiffs appealed. The Court of Appeals, Schroeder, Circuit Judge, held that: (1) social services worker was entitled to prosecutorial immunity for his role in initiation of dependency proceedings; (2) employees of conciliation court who allegedly refused to allow father visitation rights and attempted to bias foster parents were entitled to quasi-judicial immunity; and (3) county department of social services could not be held liable for unauthorized activities of its employees.

Affirmed.

1. Social Security and Public Welfare -5

Social services worker was entitled to prosecutorial immunity for his role in initiating dependency proceedings against father. 42 U.S.C.A. § 1983.

2. Social Security and Public Welfare -5

Social workers are entitled to absolute immunity in performing quasi-prosecutorial functions connected with initiation and pursuit of child dependency proceedings.

3. Social Security and Public Welfare -5

Social services worker was entitled to qualified immunity for ordering father to stay away from his home before dependency hearing. 42 U.S.C.A. § 1983; West's Ann.Cal.Welf. & Inst.Code § 16501.

4. Courts -55

Employees of conciliation court who allegedly refused to allow father visitation rights and attempted to bias foster parents were entitled to quasi-judicial immunity; employees were performing judicial function at direction of court, controversy involved pending case to which they had been assigned, and events at issue arose directly and immediately out of confrontation between employees and parties in that case.

42 U.S.C.A. § 1983.

5. Civil Rights -13.7

County department of social services could not be held liable for unauthorized activities of its employees during child dependency proceeding. 42 U.S.C.A. § 1983.

Vaughn E. Spunaugle, Richmond, Cal., for plaintiffs-appellants.

Jeffrey G. Nevin, San Francisco, Cal., and Thomas A. Watrous, Martinez, Cal., for defendants-appellees.

Appeal from the United States District Court for the Northern District of California.

Before SCHROEDER, CANBY and BOOCHEVER, Circuit Judges.

SCHROEDER, Circuit Judge:

In this appeal we must decide whether a social service worker performing duties re-

lated to the filing of child custody and abuse proceedings has absolute prosecutorial immunity. We must also decide whether principles of quasi-judicial immunity apply to court employees participating under court directives in the resolution of family disputes.

The plaintiffs are David Meyers, his children and his parents. They brought this civil rights action under 42 U.S.C. § 1983 against David's former wife Amy, and numerous individual and governmental defendants. They claimed that the defendants conspired, under color of state law and without due process of law, to prevent the adult plaintiffs from associating with the minor plaintiffs in deprivation of a liberty interest. The district court dismissed as to all defendants. The plaintiffs appeal only the dismissals as to appellees Haaland, a social worker, Allison and Crossley, em-

ployees of the Family Conciliation Court, and the Contra Costa County Department of Social Services (DSS). We hold, first, that Haaland was entitled to absolute prosecutorial immunity for all of his actions except those which preceded the institution of judicial proceedings and as to those actions, qualified immunity applies; second, that Allison and Crossley were entitled to quasi-judicial immunity for their actions; and, third that the plaintiffs never demonstrated that the acts complained of were pursuant to a policy or practice of the DSS. We affirm the district court in all respects.

Haaland

Haaland was a social casework specialist employed by the DSS in its Children's Protective Services Unit. Among his numerous responsibilities were the initiation and pursuit of dependency petitions in cases of suspected child neglect and abuse. His

alleged conduct about which plaintiffs complain in this appeal was directly related to those functions.

Plaintiffs claim that, beginning on October 9, 1981, Haaland conspired with Amy Meyers to deprive David Meyers of custody of their children. According to the complaint, after being told by Amy that David had molested their son Paul, Haaland embarked on a course of conduct designed to separate Paul from his family by supervising an investigation and filing verified dependency petitions with the juvenile court of the Contra Costa County Superior Court requesting that the minor children be declared dependents of the juvenile court and removed from the custody of their father.

In this appeal plaintiffs place particular emphasis on the allegation that on October 23, 1981, Haaland ordered David to stay away from his home until after a judicial

hearing could take place on October 26, although Haaland knew that the police department had terminated its investigation for lack of evidence. At the October 26 hearing, Haaland stated that he would arrange for supervised visitation between David and his children. According to the complaint, Haaland permitted David only one opportunity to visit with his children between the date the petition was filed, October 26, and the date it was dismissed pursuant to Haaland's recommendation, November 17.

The complaint also states that in a January 19, 1982 custody hearing, Haaland in furtherance of his conspiracy with Amy to deprive David of custody, testified to his conclusion that David had molested Paul. Haaland's role appears to have ceased at this point. David was eventually reunited with his children when a superior court

awarded him custody on January 23, 1984.

All of Haaland's challenged actions except for the January 1982 testimony took place within a short period of time--between October 9, 1981, and November 17, 1981. All revolve around Haaland's initiation of dependency proceedings against David. They include his instructions to David before proceedings were instituted to stay away from the children until custody had been resolved, and his subsequent testimony against David in the dependency proceedings. The district court held that Haaland was entitled to absolute immunity for these actions. We agree as to all except actions which were taken before the institution of judicial proceedings.

It is beyond question that Haaland is entitled to absolute immunity for the testimony he gave during the dependency proceedings and the custody hearing because

witnesses, including government witnesses, are immune from liability for their testimony. Briscoe v. LaHue, 460 U.S. 325, 103 S.Ct. 1108, 75 L.Ed.2d 96 (1983).

[1] Haaland should be accorded prosecutorial immunity for his role in the initiation of dependency proceedings against Meyers. The Supreme Court has held that prosecutorial immunity derives from a need for the exercise of independent judgment in the conduct of public duties. Imbler v. Pachtman, 424 U.S. 409, 423, 96 S.Ct. 984, 991, 47 L.Ed.2d 128 (1976). Prosecutorial immunity is absolute, rather than qualified, in order to permit prosecutors to perform their duties without fear of even the threat of section 1983 litigation. If the prosecutor were only qualifiedly immune,

> the threat of § 1983 suits would undermine performance of his duties no less than would the threat of common-law

suits for malicious prosecution. A prosecutor is duty bound to exercise his best judgment both in deciding which suits to bring and in conducting them in court. The public trust of the prosecutor's office would suffer if he were constrained in making every decision by the consequences in terms of his own potential liability in a suit for damages.... Further, if the prosecutor could be made to answer in court each time ... a person charged him with wrongdoing, his energy and attention would be diverted from the pressing duty of enforcing the criminal law.

... Frequently acting under serious constraints of time and even information, a prosecutor inevitably makes many decisions that could engender colorable claims of constitutional deprivation. Defending these decisions, often years after

> they were made, could impose unique and intolerable burdens upon a prosecutor responsible annually for hundreds of indictments and trials.

Id. at 424-26, 96 S.Ct. at 992-93; see also Butz v. Economou, 438 U.S. 478, 512, 98 S.Ct. 2894, 2913, 57 L.Ed.2d 895 (1978) ("[a]bsolute immunity is ... necessary to assure that judges, advocates, and witnesses can perform their respective functions without harassment or intimidation").

[2] Although child services workers do not initiate criminal proceedings, their responsibility for bringing dependency proceedings, and their responsibility to exercise independent judgment in determining when to bring such proceedings, is not very different from the responsibility of a criminal prosecutor. The social worker must make a quick decision based on perhaps incomplete information as to whether to

commence investigations and initiate proceedings against parents who may have abused their children. The social worker's independence, like that of a prosecutor, would be compromised were the social worker constantly in fear that a mistake could result in a time-consuming and financially devastating civil suit. We therefore hold that social workers are entitled to absolute immunity in performing quasi-prosecutorial functions connected with the initiation and pursuit of child dependency proceedings. Such a holding is consistent with the holdings of other courts. See, e.g., Kurzawa v. Mueller, 732 F.2d 1456, 1458 (6th Cir.1984); Pepper v. Alexander, 599 F.Supp. 523, 526-27 (D.N.M.1984); Whelehan v. County of Monroe, 558 F.Supp. 1093, 1098-99 (W.D.N.Y.1983).

[3] We do not agree, however, that all of Haaland's alleged conduct falls within

the scope of quasi-prosecutorial activities. On October 23, Haaland allegedly ordered Meyers to stay away from his home until after the hearing before the juvenile court. At that time, Haaland had not yet initiated dependency proceedings. Haaland is not entitled to absolute immunity for this act.

In Ashelman v. Pope, 793 F.2d 1072 (9th Cir.1986) (en banc), we examined the contours of both judicial and prosecutorial immunity. We stated:

> Prosecutorial immunity has developed along much the same lines as judicial immunity. Immunity extends to protect a prosecutor who acts within his or her authority and in a quasi-judicial capacity.... Where a prosecutor acts as an advocate "in initiating the prosecution and in presenting the state's case," absolute immunity applies.

Id. at 1076 (quoting Imbler, 424 U.S. at

431, 96 S.Ct. at 995). Haaland's ordering of Meyers away from his home can be characterized neither as advocatory or quasi-judicial. Haaland's action did not aid him in the preparation or presentation of his case to the juvenile court. Compare Walden v. Wishengrad, 745 F.2d 149 (2d Cir.1984)(absolute immunity for social services attorney who requested warrant to insure testimony of witnesses.). Rather than contributing to an informed judgment by an impartial decisionmaker as an advocate, Haaland acted unilaterally prior to the operation of the judicial process. We do not suggest that Haaland's alleged action was necessarily improper; it was merely not that of an advocate.

Furthermore, the policy considerations that support quasi-judicial immunity do not apply to Haaland's action. In Sellars v. Procunier, 641 F.2d 1295 (9th Cir.), cert.

denied, 454 U.S. 1102, 102 S.Ct. 678, 70 L.Ed.2d 644 (1981), we considered the justification for the doctrine of quasi-judicial immunity. After examining the benefits of absolute immunity for certain decisionmakers, we stated:

> Nevertheless, the balance might not be struck in favor of absolute immunity were it not for the presence of safeguards built into the judicial process that tend to reduce the need for private damage actions as a means of controlling unconstitutional conduct.

Id. at 1300. We then quoted a portion of the following passage from Butz.

> The cluster of immunities protecting the various participants in judge-supervised trials stems from the characteristics of the judicial process rather than its location....

> ...[T]he safeguards built into the judicial process tend to reduce the need for private damages actions as a means of controlling unconstitutional conduct. The insulation of the judge from political influence, the importance of precedent in resolving controversies, the adversary nature of the process, and the correctability of error on appeal are just a few of the many checks on malicious action by judges.... Because these features of the judicial process tend to enhance the reliability of information and the impartiality of the decisionmaking process, there is a less pressing need for individual suits to correct constitutional error.

438 U.S. at 512, 98 S.Ct. at 2913-14.

Haaland's alleged decision to order Meyers away from his house was made in the absence of such "safeguards built into the judicial process." Haaland himself was not

subject to the checks operating on judicial decisionmakers, nor was his decision part of or ancillary to pending judicial proceedings supervised by a judge.

Although absolute freedom from the threat of unfounded lawsuits is an ideal condition for decisionmaking, such freedom is the rare exception to the rule. See id. at 508, 98 S.Ct. at 2911-12. We conclude that, like the decisions of other officials acting in a non-judicial role, it is the qualified immunity standard which must govern Haaland's immunity defense for the alleged action of ordering Meyers from his house. See Davis v. Scherer, 468 U.S. 183, 104 S.Ct. 3012, 82 L.Ed.2d 139 (1984); Harlow v. Fitzgerald, 457 U.S. 800, 102 S.Ct. 2727, 73 L.Ed.2d 396 (1982). See also Duchesne v. Sugarman, 566 F.2d 817 (2d Cir. 1977)(applying qualified immunity doctrine to conduct of social worker when no court

proceedings had been filed). Haaland's decision to order Meyers away from his house is sufficiently protected by that doctrine.

In Duchesne, the social worker actually took custody of the children, instituted no court proceedings, and for many months refused the parent's demands for a hearing. 566 F.2d at 822-24. The Second Circuit held that the parent's rights had been violated and that triable issues were raised as to the applicability of the qualified immunity defense. Id. at 833. We have found no cases similar to this one, however, in which the social worker acted promptly to institute proceedings after unilaterally attempting to influence a parent-child relationship. Under the doctrine of qualified immunity, executive officers are shielded from liability where "their conduct does not violate clearly established statutory or constitutional rights of which a reasonable per-

son would have known." Harlow, 457 U.S. at 818, 102 S.Ct. at 2738. Under California law, social workers are given broad general authority to protect and promote the welfare of all children; to prevent or remedy problems which may result in the neglect or abuse of children. Cal.Welf. & Inst. Code § 16501 (West Supp.1987). The relevant pre-1982 section provided that a "child protective services program ... shall take such actions as are considered necessary to protect the child and correct the situation...." Cal.Welf. & Inst. Code § 16501 (West 1980). Haaland's conduct on October 23, which indisputably involved no physical interference with parental custody, cannot be said to have violated clearly established statutory or constitutional rights.

Allison and Crossley

[4] Crossley is a "supervising counselor"

and Allison is an "associate counselor" of the Family Conciliation Court. Their positions were created by the Family Conciliation Court Act and they are employees of the court. Their duties, as described by Cal.Civ.Proc.Code § 1744, encompass mediation of custody and visitation disputes, investigating matters pertaining to such disputes, and providing reports to the courts.

During the fall of 1977, the parents, Amy and David Meyers, together with the paternal grandparents, participated in a series of voluntary counseling sessions conducted by Allison under the auspices of the Family Conciliation Court. The adult plaintiffs allege that during these sessions Allison became biased against them. They further allege that at some point during the latter half of 1981, but before October 8, 1981, Amy made allegations of child abuse to

Allison who willfully failed to discuss them with David or to otherwise investigate them. The complaint alleges that on November 16, 1981, David and Amy attended a mandatory conciliation session with a counselor from the Family Conciliation Court, and that upon learning of the session, Allison induced Crossley to reassign the case to her in spite of her bias against David.

The complaint further alleges that from November 19, 1981, through January 21, 1982, Allison refused to arrange for visitation between David and his children in willful violation of a court order requiring her to arrarge such visits. The complaint continues that on or about April 7, 1982, Crossley and Allison visited the foster parents in whose care the court had placed the children and attempted to induce them to refuse David and his parents the right to see

the children.

The district court held that Allison and Crossley, as officers of the court, were entitled to quasi-judicial immunity. We have granted quasi-judicial immunity to various officers of the court. See, e.g., Sharma v. Stevas, 790 F.2d 1486, 1486 (9th Cir.1986)(clerk of the United States Supreme Court); Demoran v. Witt, 781 F.2d 155, 158 (9th Cir.1985)(probation officers); Sellars, 641 F.2d at 1303 (parole officers).

Based on these precedents, we agree with the district court that as officers of the court Allison and Crossley have absolute immunity in the performance of duties authorized by the statute. Although the plaintiffs allege that certain actions taken by Allison and Crossley constituted violations of court orders, absolute immunity is lost only if these actions were "clearly and completely outside the scope of [Allison's

and Crossley's] jurisdiction." Demoran, 781 F.2d at 158. Their actions were not outside that scope.

Allison and Crossley were performing a judicial function at the direction of a court. The controversy involved a pending case to which they had been assigned, and the events at issue arose directly and immediately out of a confrontation between the defendants and parties in that case. The allegations that Allison and Crossley refused to allow David visitation rights and attempted to bias the foster parents are not materially different from the allegation that a judge and prosecutor conspired to deprive a prisoner of effective counsel and access to legal materials. In Ashelman, we held the latter allegation insufficient to overcome judicial and prosecutorial immunity. 793 F.2d at 1078.

The County Department of Social Services

[5] The district court held that the plaintiffs had made an insufficient showing that the acts complained of in this case were pursuant to an established policy or practice as required by Monell v. Department of Social Services, 436 U.S. 658, 691, 98 S.Ct. 2018, 2036, 56 L.Ed.2d 611 (1978). We agree with the district court that

> a close reading of the first count of the complaint indicates that it is not the policies themselves that are alleged to give rise to the constitutional deprivations of which plaintiffs complain. Rather, the complaint states that various unauthorized actions were committed by the named defendants in furtherance of an alleged conspiracy to deprive plaintiffs of custody of the children.

Because municipalities are not liable for the unauthorized activities of their employ-

ees, the district court correctly dismissed the claim as to DSS.

Affirmed.

BOOCHEVER, Circuit Judge, dissenting in part:

I believe that the Meyers have stated sufficient allegations of deprivation of statutory and constitutional parental rights by alleging that Haaland ordered David Meyers to stay away from his home. I would remand for resolution of the factual issues involved in a qualified immunity defense.

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

DAVID GLEN MEYERS, GEORGE ALBERT MEYERS, GEORGIA ANN MEYERS, PAUL DAVID MEYERS, a minor, MATTHEW CHRISTOPHER MEYERS, a minor, ANGELA JENNIFER MEYERS, a minor, by their next friend, DAVID GLEN MEYERS. Plaintiffs, vs. CONTRA COSTA COUNTY DEPARTMENT OF SOCIAL SERVICES, AMY GARCIA MEYERS, NANCY BOWMAN, HAROLD HAALAND, also known as HAROLD BUEIDE, FAMILY CONCILIATION COURT OF THE SUPERIOR COURT OF CONTRA COSTA COUNTY, KAY CROSSLEY, AGNES H. ALLISON, JAMES PALMER, and FAMILIES UNITED RESOURCE DEVELOPMENT BOARD, INC., a corporation, Defendants.	NO. C-84-6381-MHP MEMORANDUM AND ORDER

Plaintiffs bring this action pursuant to 42 U.S.C. §1983 for alleged violations

of their constitutional rights resulting from state proceedings removing the minor plaintiffs (Matthew, Angela and Paul Meyers) from the custody of their father (David Meyers) and paternal grandparents (George and Georgia Meyers). Named as defendants in their official and individual capacities are the children's mother Amy Meyers, the Contra Costa County Department of Social Services ("DDS"), DDS social worker Haaland, the Family Conciliation Court of the Superior Court of Contra Costa County ("FCC"), FCC Director Crossley, FCC Counselor Allison, Families United Resource Development Board ("FU"), FU psychologist Palmer, and FU employee Bowman.

The gravamen of the civil rights claim is that the various defendants conspired to deprive the adult plaintiffs of contact with the children. Plaintiffs also bring pendent state claims for intentional infliction of

emotional distress, negligent infliction of emotional distress, libel, and slander. They seek $16 million in damages for each alleged constitutional violation and $20 million for each pendent claim.

Defendants have moved to dismiss or for summary judgment. Having considered the parties' papers and heard oral argument the court grants defendants' motions and dismisses the §1983 and pendent state claims.

Background

The facts as presented in the complaint and the parties' supporting papers are as follows: On October 8, 1981 Amy Meyers ("Amy") and Haaland allegedly entered into a conspiracy to deprive Davis Meyers ("David") of the custody of his children. Amy told Haaland that David had sexually molested one of the children (Paul), and a Haaland's instruction brought Paul to the DSS Children's Protective Service facility the next

day. Haaland "interrogated" Paul at that time, and summoned Richmond and San Pablo police officers who again "interrogated" Paul about the charges. Complaint at 4 ¶2. When David arrived at the DSS facility to look for Paul he too was detained and interrogated by the police officers. Paul was taken to Brookside Hospital for a medical examination.[1/]

On October 23 the San Pablo Police Department informed David it had terminated its investigation of the child molestation charges for lack of evidence. David communicated this fact to Haaland and informed Haaland he was going home to see his children. Haaland allegedly ordered David to stay away from his home pending a hearing on October 26 regarding a dependency petition filed by Haaland pursuant to Cal. Welf. & Inst. Code §300(a).[2/] See Haaland Dec. at ¶5. David claims that Haaland knew or should

have known the statements in the petition were false. Complaint at 6 ¶6.

David, his attorney, Amy and Haaland appeared before a Juvenile Court Referee on October 26. The Referee detained Pail in Amy's custody due to "immediate and urgent necessity for [his] protection. See Findings and Order of Referee on Detention (Reply Brief of Harold Haaland, Exh. A). Plaintiffs claim that as a result of this hearing Haaland unlawfully assumed control of visitation over the children. Complaint at 7 ¶7.[3/]

The hearing on the dependency petition was continued until November 17, David, his parents, and his attorney attended the hearing, at which time the petition was dismissed pursuant to Haaland's recommendation. Haaland states that he so recommended "because the mother was doing everything she

could to protect the child and had agreed to continue protective services on a voluntary basis . . ." Haaland Dec. at ¶7. Plaintiffs claim that this dismissal denied them an opportunity to be heard regarding the allegations against them. Complaint at 8 ¶8. However, plaintiffs' attorney withdrew his objection to the dismissal. Haaland Dec. at ¶7.

Meanwhile, Amy had initiated divorce proceedings and had obtained a temporary restraining order forbidding David from occupying or approaching the family residence. On November 16 David and Amy attended a mandatory conciliation session with an FCC counselor. Plaintiffs claim that defendant Allison, who had developed an "aversion to and bias against" the plaintiffs following voluntary counseling sessions in 1977, induced defendant Crossley to assign the Meyers case to her. Plaintiffs allege that Allison

acted pursuant to a conspiracy with Amy. Complaint at 9 ¶2, 10 ¶3, 11 ¶5.

At a Superior Court hearing on November 19 the court awarded temporary custody to Amy pursuant to the following stipulation regarding visitation: "Visitation shall take place under the supervision of the Conciliation Court and in the presence of a neutral adult to be selected by the Conciliation Court." Complaint at 11 ¶6. Plaintiffs allege that defendant Allison refused to arrange for visitation between November 19, 1981 and January 29, 1982 in violation of court order.

Haaland referred the Meyers case to FU for psychological examination in November 1981. In January 1982 defendant Palmer issued a report concluding that David had sexually molested Paul and recommending no contact between Paul and his father or grandparents. Plaintiffs claim that Palmer

was acting in concert with Haaland and Amy and knew or should have known that the allegations were false. Complaint at 12 ¶8.

On January 29, 1982 a second custody/visitation hearing commenced before the Superior Court. Haaland and Palmer testified at the hearing. Plaintiffs allege that the defendants knew or should have known their testimony was false. Complaint at 12 ¶9. The hearing was continued until February 5, at which time the court awarded custody to Amy and found that visitation between David and the children should commence as soon as an appropriate "neutral" monitor was appointed. The court expressed concern regarding Amy's attitude towards reestablishment of contact between the father and the children and stated that without a significant change in this attitude the court would remove the children from her custody and place them with the father or a third party.

Myers v. Myers, No. 228557, slip op. at 2 (Sup. Ct. February 5, 1982) (FU Motion to Dismiss, Exh. A).

Foster care parents (the Richardsons) took custody of the Meyers children on March 29 pursuant to court order. The court ordered Crossley to make a home visit to the Richardsons and make a written report. Plaintiffs allege that Crossley and Allison visited the Richardsons' home on March 29, 1982 and attempted to influence the Richardsons against David and his parents. Complaint at 12 ¶12. Plaintiffs further allege that Amy so harassed the Richardsons in furtherance of her conspiracy with Haaland that on April 9 the Richardsons surrendered custody of the children to Amy. Complaint at 14-15 ¶13. David eventually was awarded custody in January 1984. Myers v. Myers, No. 228557, slip op. at 2 (Sup. Ct. January 23, 1984) (FU Motion to Dismiss Exh. B).

Discussion

1. Counts One and Two

Counts one and two of the instant complaint attempt to state claims under 42 U.S.C. §1983. The first count pertains to those activities prior to the dismissal of the dependency petition on November 17, 1981, i.e., the initial removal of the minor plaintiffs from the custody of the father. The second count addresses alleged violations relating to the custody proceeding before the Superior Court. For the reasons set forth below, the complaint fails in the first instance because the constitutional violations alleged do not state claims under 42 U.S.C. §1983. Even were the alleged violations sufficient, the complaint would fail because plaintiffs may not proceed under that statute against any of the named defendants.

A. Failure to State a Claim

Section 1983 provides a cause of action for the "deprivation of any right, privilege or immunities secured by the Constitution and laws" of the United States. 42 U.S.C. §1983. Defendants do not dispute that the right of both parents and children to remain together without the "coercive interference of the awesome power of the state" is a liberty interest protected by the constitution. Duchesne v. Sugarman, 566 F.2d 817, 825 (2nd Cir. 1977). However, the existence of a protected right alone does not suffice to state a claim under 42 U.S.C. §1983. In order to survive a motion to dismiss, plaintiffs must also allege that they were deprived of their liberty interests under color of state law without due process. Parratt v. Taylor, 451 U.S. 527, 537 (1981)(distinguishing between the existence of a protected

interest and the deprivation of that interest without due process). This plaintiffs have failed to do.

In Parratt v. Taylor, the Court ruled that when an individual is deprived of property by the unauthorized, negligent conduct of state officials there is no due process violation as long as the state provides meaningful post-deprivation remedies. The Court reasoned that pre-deprivation remedies are not feasible when a state employee acts in a random and unauthorized manner rather than pursuant to state procedures because the state cannot predict when such actions will occur. The Court found its decision consistent with prior rulings that

> either the necessity of quick action by the State or the impracticality of providing any meaningful predeprivation process, when coupled with the availability of some meaningful means by which to

> assess the propriety of the State's action at some time after the initial taking, can satisfy the requirements of procedural due process.

451 U.S. at 539 (footnote omitted). The Supreme Court applied this reasoning to unauthorized intentional deprivation of property in Hudson v. Palmer, __ U.S. ___, 104 S. Ct. 3194 (1984). The Ninth Circuit has extended Parratt to deprivations of liberty interests. Haygood v. Younger, 718 F.2d 1472, 1480 (9th Cir. 1983), rehearing granted en banc, 729 F.2d 613 (9th Cir. 1984); Bretz v. Kelman, 722 F.2d 503 (9th Cir. 1983); Rutledge v. Arizona Board of Regents, 660 F.2d 1345 (9th Cir. 1981), aff'd sub nom Kush v. Rutledge, 103 S.Ct. 1483 (1983).[4/]

Parratt and its progeny do not apply when state policies and procedures are claimed to violate constitutional rights. Plaintiffs allege that the DSS regulations as

carried out by Haaland, including its policy of "crediting all allegations of child sexual abuse regardless of circumstances," violated their constitutional rights. Complaint at 8 ¶9. The complaint is no more specific as to the particular policies at issue. However, the policy articulated by plaintiffs, the actions of Haaland as alleged, and the provisions of Cal. Welf. & Inst. Code §300 et seq. convince the court that the purpose of the policies of which plaintiffs complain is to provide immediate relief to children in an emergency situation. Accordingly, policies allowing for immediate removal of a child from the custody of a parent charged with sexual abuse do not violate due process as long as the parent may be heard on the action at a subsequent proceeding. Ewing v. Mytinger & Casselberry, 339 U.S. 594, 598 (1950)("no hearing at the preliminary stage [of an administrative proceeding] is required

by due process as long as the requisite hearing is held before the final administrative order becomes effective"). See also Duchesne v. Sugarman, 566 F.2d at 826 (finding that "the initial removal of the children without parental consent or a prior court order was permissible" in response to an emergency situation); Williams v. Birzon, 576 F. Supp. 577, 579 (W.D.N.Y. 1983), aff'd 740 F.2d 955 (2nd Cir. 1984) ("the state's obligation to protect the health and safety of minor children authorizes an award of temporary custody without a pre-deprivation hearing"). The complaint itself indicates that plaintiffs were present at hearings on the matter within three weeks of the initial deprivation. Thus, plaintiffs cannot claim that the DSS policies themselves violated their constitutional rights.[5/]

Moreover, a close reading of the first count of the complaint indicates that it is

not the policies themselves that are alleged to give rise to the constitutional deprivations of which plaintiffs complain. Rather, the complaint states that various unauthorized actions were committed by the named defendants in furtherance of an alleged conspiracy to deprive plaintiffs of custody of the children. For example, Haaland is charged with detaining and interrogating David, ordering him to stay away from his home, and assuming control of visitation without lawful authority, and with filing a false dependency petition. Such actions are precisely the types of unauthorized conduct which, for purposes of §1983, can be corrected by the opportunity for post-deprivation review.

As noted, the complaint itself makes clear that plaintiffs were afforded an opportunity to be heard on the award of temporary custody to the mother shortly after the

children were removed from the father: Paul was first removed from David's custody on October 9, 1982, and hearings on the matter were held on October 26 and November 17. The instant case thus differs significantly from Duchesne v. Sugarman, where the court found a due process violation when the state did not seek to obtain ratification of its order to retain custody of the children for 36 months after they were taken from the mother, and only after the mother had initiated habeas corpus proceedings. 566 F.2d at 826. The court finds due process requirements satisfied in this case. Accord Whelehan v. County of Monroe, 558 F. Supp. 1093, 1102 (W.D.N.Y. 1983)(distinguishing Duchesne and finding state remedies subsequent to removal of child from parental custody adequate to satisfy due process).

The complaint further alleges that Haaland's dismissal of the dependency

petition violated plaintiffs' rights because it deprived them of the opportunity to be heard regarding the allegations against them. Even if the dismissal of the petition impinged on protected liberty interest, the complaint fails to state a claim for deprivation of constitutional rights in light of state procedures designed to compel commencement of juvenile court proceedings. See Cal. Welf. & Inst. Code. §331.[6/] Moreover, the complaint itself makes clear that custody/visitation hearings were commenced before the Superior Court two days after Haaland dismissed the petition.

Finally, count two of the complaint charges various defendants with depriving the adult plaintiffs of their constitutional right of contact with the children by interfering with the visitation agreement established by the Superior Court. This count also charges defendants with improperly

influencing the custody determination. The actions of which plaintiffs complain, which allegedly were "overt acts" in furtherance of the alleged conspiracy, include Allison's failure to arrange for visitation of the children by the father, Palmer's filing of a false report, Palmer's and Haaland's giving of false testimony at custody hearings, and Allison's and Crossley's attempt to influence the Richardsons.

Again, these allegations fail to state a claim because adequate state post-deprivation remedies were available to redress the alleged violations. For example, plaintiffs had ample recourse to state contempt procedures to compel state officials to comply with the orders of the Superior Court regarding visitation. Moreover, the facts as alleged show that the custody proceedings before the Superior Court were ongoing after the initial award of custody to Amy and that

the adult plaintiffs ultimately were awarded custody of the children. The court finds the continued opportunity to litigate the custody determination in this case satisfies the requirement of due process. Accord Williams v. Birzon, 576 F. Supp. at 579-80 (finding that the numerous opportunities to challenge an award of temporary custody afforded plaintiff adequate due process of law).

In sum, the availability and, indeed, the utilization of various state proceedings in which the adult plaintiffs could litigate custody and/or visitation of the children precludes an action for deprivation of constitutional rights under §1983. It is the opportunity for a meaningful hearing that determines the adequacy of procedural due process, not the result of such a hearing. "While it is conceivable that state judicial machinery might be used to deprive a person of his property without due process of law[,]

. . . in order to make out such a case under the civil rights act, a plaintiff must show that federally protected rights were denied in state proceedings which were so abused or manipulated that they were in effect a nullity." Gill v. Gill, 412 F. Supp. 1153, 1157 (E.D. Pa. 1976). The facts pleaded in the instant complaint do not make such a showing.

B. Failure to Name Proper Defendants

Plaintiffs argue that their allegations of conspiracy to deprive them of custody of the children, coupled with the identification of various "overt acts," suffice to survive a motion to dismiss. However, the instant complaint is wholly lacking in specific facts showing that Amy, Haaland, the FCC employees, and the FU employees conspired to deprive plaintiffs of their constitutional rights. Conclusory allegations are insufficient to state claims under the civil rights statutes. Hutchinson v. United

States, 677 F.2d 1322, 1327 (9th Cir. 1982). Moreover, many of the "overt acts," such as the allegations regarding Crossley and Allison's visit to the Richardsons, are not the proximate cause of the alleged deprivations.

Even if the overt acts alleged would constitute acts in furtherance of conspiracy to violate plaintiffs' civil rights, this action must be dismissed because plaintiffs may not proceed under 42 U.S.C. §1983 against any of the named defendants.

1. The Family Conciliation Court

Cal. Civ. Pro. §1740 provides that "[e]ach superior court shall exercise the jurisdiction conferred by this chapter, and while sitting in the exercise of such jurisdiction shall be known and referred to as the "family conciliation court." Thus, the FCC is the same entity as the Superior Court. State courts are not subject to suit under

42 U.S.C. §1983. O'Connor v. Nevada, 686 F.2d 749 (9th Cir.) cert. denied., 459 U.S. 1071 (1982) (dismissing civil rights action against state court under Eleventh Amendment).

2. Allison and Crossley

Crossley is a "supervising counselor" and Allison is an "associate counselor" of the FCC. Their positions are created by the Family Conciliation Court Act; they are hired and fired by the Court, and their duties are described by statute. Cal. Civ. Pro. §1744. These duties encompass those described in the instant complaint: conducting mediation of custody and visitation disputes, investigating matters pertaining to such disputes, and providing reports to the court. Inasmuch as Crossley and Allison are officers of the court and the actions of which plaintiffs complain were performed in the course of their employment, they are entitled to "quasi-judicial" immunity, even for

allegedly conspiratorial acts. Agnew v. Moody, 330 F.2d 868, 869 (9th Cir.), cert. denied, 379 U.S. 867 (1964).

Plaintiffs argue that immunity should extend to officers of the court only if they perform prosecutoral functions. Plaintiffs ignore the developments in the doctrine of immunity in civil rights cases, which extends immunity to numerous officers of the court, including those performing functions similar to these defendants. See, e.g., Burkes v. Callion, 433 F.2d 318 (9th Cir. 1970), cert. denied, 403 U.S. 908 (1971)(quasi-judicial immunity extended to probation officers and court-appointed psychiatrists).

3. Harold Haaland

Haaland is a social worker employed by the Contra Costa County Department of Social Services. Cal. Welf. & Inst. Code 300 et seq. gives him the discretion to determine whether to take a child into protective

custody and whether to file a dependency petition with the state in cases of suspected child abuse. These duties resemble those of a prosecutor with respect to child welfare cases.

Haaland argues that he should be afforded absolute immunity for his actions in this case. In Imbler v. Pachtman, 424 U.S. 409 (1976), the Court granted prosecutors absolute immunity from liability under 42 U.S.C. §1983. The court reasoned the "public trust" would suffer if prosecutors had to make decisions regarding which cases to initiate and pursue while contemplating personal liability for their actions. 424 U.S. 424-25. See also Butz v. Economou, 438 U.S. 478, 512 (1978) ("Absolute immunity is . . . necessary to assure that judges, advocates, and witnesses can perform their respective functions without harassment or intimidation").

Plaintiffs appear to concede that Haaland is immune from suit to the extent that his actions are prosecutorial. However, they argue that he should not be afforded immunity for non-prosecutorial actions taken after he dismissed the dependency petition. Plaintiffs cite Morrison v. Jones, 607 F.2d 1269, 1274 (9th Cir. 1979), cert. denied, 445 U.S. 962 (1980), for the proposition that DSS employees should not be afforded immunity. This case is not on point. The DSS employee at issue in Morrison was the Director of the Department, who was afforded qualified immunity in light of his position as an executive officer. The non-prosecutorial duties of a social worker such as Haaland are far different from the duties performed by a DSS Director and raise questions of policy not addressed by the Morrison court.[7/]

In Whelehan v. County of Monroe, 558 F.

Supp. 1093 (W.D.N.Y. 1983) the court extended the immunity afforded prosecutors in Imbler to Social Services Department employees performing both prosecutorial and investigative functions in cases of child abuse. Plaintiffs in Whelehan sued a county social worker and other defendants for damages sustained when their child was removed from their custody pursuant to a lawful but erroneous charge of child sexual abuse. The court wrote,

> The great importance of the child-protective function served by these defendants is beyond question. If these defendants, and others who serve like functions in society, were forced to execute their duties with one eye constantly regarding the possibility of incurring liability for their conduct, the detriment to society and the judicial system would be at least as great as if they were prosecutors of the kind specifically protected by Imbler.

Id. at 1098.

This court is persuaded by the reasoning in Whelehan and grants Haaland absolute immunity for all actions in connection with his employment with DSS. The court is particularly impressed, as was the Whelehan court, with the discretion afforded DSS employees such as Haaland in performing their duties of responding to, investigating, and acting upon reports of suspected child abuse. The instant case is distinguishable from Doe v. County of Suffolk, 494 F. Supp. 179 (E.D.N. Y. 1980) in this respect for the Doe court based its refusal to grant absolute immunity to a social worker on its finding that the defendant had virtually no discretion in performing her duties.

Finally, in addition to the immunity afforded Haaland for actions taken in performing his duties, he is entitled to absolute immunity for his testimony at the custody/visitation hearing. Briscoe v.

LaHue, 460 U.S. 325 (1983)(police officer and private party witnesses held absolutely immune from liability for allegedly perjured testimony at a criminal trial).

4. Department of Social Services

Plaintiffs name the Contra Costa County Department of Social Services as a party to this action. Essentially, a suit against the Department is a suit against the County. Municipalities are subject to suit under §1983. Monell v. Department of Social Services, 436 U.S. 658 (1978). However, they may not be held liable under 42 U.S.C. §1983 for the actions of their employees under a theory of respondeat superior. Id. at 691. The gravamen of this complaint is that Haaland's actions outside the scope of his authority violated plaintiffs' rights. Under Monell, plaintiffs may not hold the County liable for the alleged misconduct of its employee.

In order to state a §1983 claim against a municipality, plaintiffs must allege that "under color of some official state policy [the municipality] 'causes' an employee to violate another's constitutional rights." Monell, 436 U.S. at 692. As noted, plaintiffs do allege that Haaland acted pursuant to an official policy that all allegations of sexual abuse be credited regardless of circumstances. For the reasons set forth in Part IA of this order, the court finds this policy does not violate plaintiffs' constitutional rights. Moreover, this court fails to see how this policy itself "caused" the deprivations plaintiffs claim they suffered. Plaintiffs have not shown an "affirmative link" between the occurrence of misconduct and the policy or custom at issue. Rizzo v. Goode, 423 U.S. 362, 371 (1976).

5. Families United

FU is a state-licensed psychological

clinic which treats incest victims and families. Section 1983 pertains only to constitutional violations under color of state law. Plaintiffs make no showing that FU is a "state actor."

Indeed, the complaint states no allegations against this defendant. It states only that Haaland referred the Meyers case to FU, and FU employee Palmer conducted interviews and testified at one of the custody hearings. Apparently, plaintiffs seek to impose liability on FU for the alleged misconduct of Palmer in concert with Haaland. Even if Palmer were a state actor, plaintiffs could not impose §1983 liability on FU for the actions of its employee under a theory of respondeat superior. Powell v. Shopco Laurel Co., 678 F.2d 504 (4th Cir. 1982).

6. James Palmer

A private party could be said to act under color of state law if he or she jointly

engages with state or local officials in conduct prohibited by the constitution. Adickes v. S. H. Kress and Co., 398 U.S. 144, 152 (1970). However, conclusory allegations that Palmer conspired with Haaland to deprive plaintiffs of their civil rights do not suffice to state a claim that Palmer acted under color of state law. Glaros v. Perse, 628 F.2d 679, 685 (1st Cir. 1980) (general allegations of cooperation between private and state actors do not state a claim of action under color of state law).

"[T]o determine whether [a private party] acted under color of state law, the circumstances surrounding the private [action] must be examined in their totality." Howerton v. Gabica, 708 F.2d 380, 384 (9th Cir. 1983). In Howerton, the court found that private landlords were state actors for the purposes of an eviction when they "deliberately cloaked themselves with the

authority of the state in effecting repossession of the trailer premises." Id. at 384-85. The private landlords repeatedly requested the aid of the police, and the police "intervened at every step." Id. at 385.

Plaintiffs herein merely allege that Palmer conducted an interview of the Meyers family and prepared a report at the behest of a state official. Assuming arguendo that such activities implicate constitutionally-protected rights, they hardly rise to the level of the actions attributed to the private landlords in Howerton. Instead, this case is similar to Fonda v. Gray, 707 F.2d 435 (9th Cir. 1983), where the court declined to find a conspiracy between two private banks and government officials to violate plaintiff's constitutional rights. The Fonda court distinguished Howerton and wrote,

> there was no showing here that the banks 'deliberately' participated with

> the government with the purpose of violating [plaintiff's] civil rights, or that they knew of the alleged objective. Instead, the banks merely acquiesced in what appeared to them to be a proper FBI investigation.

707 F.2d at 438.

For the reasons set forth above, the court finds that Palmer was not a state actor with respect to his activities in the instant case. Further, even if he were a state actor he would be entitled to absolute immunity for his testimony as a witness in the January 1982 custody proceeding under Briscoe v. LaHue, 460 U.S. 325 (1983).

7. Nancy Bowman

The complaint does not allege improper conduct on the part of Bowman. Plaintiffs acknowledge that the complaint is insufficient as to her and request an opportunity to amend. In light of the court's rulings above, the motion to amend is denied.

8. Amy Meyers

Plaintiffs claim that Amy entered into a conspiracy with Haaland and others to deny them contact with the children. For the reasons stated above, the allegations of conspiracy do not suffice to transform Amy into a "state actor." Indeed, the complaint states no specific facts as to "overt acts" performed by this defendant.

II. Counts Three through Sixteen

These counts state claims for the common law torts of intentional infliction of emotional distress, negligent infliction of emotional distress, slander, and libel. They do not state claims cognizable under 42 U.S.C. §1983. See, e.g., Paul v. Davis, 424 U.S. 693 (1976)(common law defamation not actionable under §1983). The Supreme Court consistently has ruled that the civil rights acts should not render the Fourteenth Amendment "a font of tort law." Id. at 701.

In view of the court's dismissal of the federal causes of action, the court declines to assume jurisdiction over the pendent claims. See United Mine Workers of America v. Gibbs, 383 U.S. 715, 726 (1966). Accordingly, they are dismissed as well.

IT IS SO ORDERED.

Dated: May 6 - 1985

/s/ Marilyn Hall Patel
MARILYN HALL PATEL
United States District Judge

F O O T N O T E S

1/ Haaland's declaration sets forth a very different version of the facts. However, for purposes of this motion the court will view the facts most favorably to the plaintiffs.

2/ A dependency petition initiates proceedings in juvenile court to declare a minor a ward or dependent child. Cal. Welf. & Inst. Code. §325. Minors subject to physical abuse in the home come under the jurisdiction of the statute. Cal. Welf. & Inst. Code §300(d).

3/ Haaland states in his declaration that the court requested he supervise visitation. Haaland Declaration at ¶5.

4/ The Ninth Circuit has granted a rehearing en banc of Haygood v. Younger, Bretz v. Kelman, and Piatt v. MacDougall. Haygood v. Younger, 729 F.2d 613 (9th Cir. 1984). This court will apply the extant law pending a ruling by the en banc panel. In view of the court's determination in Part II of this order, a reversal of Haygood and related cases will not affect the disposition of the instant case.

5/ The court notes that Cal. Welf. & Inst. Code §334 provides for a hearing within 15 or 30 days of the filing of a dependency petition. Plaintiffs do not allege that the statutory procedures were not followed.

6/ As noted, Haaland's declaration indicates that plaintiffs' counsel acceded to the dismissal. Thus, the claim that plaintiffs were denied a hearing on the petition is misleading.

7/ For example, under Cal. Welf. & Inst. Code ¶202.5 DSS workers are assigned the duties of probation officers with respect to victims of child abuse as described under Cal. Welf. & Inst. Code §300 et seq. The Ninth Circuit has afforded probation officers quasi-judicial immunity. Burkes v. Callion, 433 F.2d 318 (9th Cir. 1970), cert. denied, 403 U.S. 908 (1971).

DATE: June 10, 1987

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No. 86-2024

In The

Supreme Court of the United States

October Term, 1987

DAVID GLEN MEYERS, et al.,
Petitioners,

v.

CONTRA COSTA COUNTY DEPARTMENT OF SOCIAL SERVICES, et al.,
Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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SUMMARY OF ARGUMENT

I

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ARGUMENT

I

THE NINTH CIRCUIT DECISION GRANTING PROSECUTORIAL IMMUNITY TO A SOCIAL WORKER EXERCISING INDEPENDENT DISCRETION IN INITIATING A CHILD DEPENDENCY PROCEEDING IS NOT IN CONFLICT WITH DECISIONS OF THIS COURT OR OTHER COURTS OF APPEAL.

Contrary to petitioners' contention, the decision of the Court of Appeal for the Ninth Circuit that "HAALAND

should be accorded prosecutorial immunity for his role in the initiation of dependency proceedings against MEYERS" is fully consistent with decisions of this Court and other federal circuits which have considered the issue.

In limiting the application of immunity to the social worker's quasi-prosecutorial function, the Ninth Circuit followed precedent of this court. In *Imbler v. Pachtman,* 424 U.S. 409 (1976), this Court held that a state prosecutor enjoys absolute immunity from liability for damages under 42 U.S.C. § 1983 when he initiates and presents a criminal prosecution. The court noted the well-settled common law rule of prosecutorial immunity and concluded that considerations of public policy underlying the common law rule likewise countenance its applicability under § 1983. *Ibid.* at 424.

Among the factors the Court considered in reaching this conclusion was the threat that the prosecutor's duties would be undermined and the public trust in his office would suffer if he were constrained in making every decision by the consequences in terms of his own personal liability, the serious constraints of time and even information under which a prosecutor must frequently act, and the adverse effect upon the functioning of the criminal justice system if concerns about his potential personal liability hampered the exercise of his judgment. The same considerations apply to a social worker who exercises quasi-prosecutorial functions in the initiation of child dependency proceedings. The protection of children against abuse and neglect is dependent upon the ability of social workers to invoke judicial processes on behalf of children. His performance of these functions is an "integral part of the

judicial process," no less than the prosecutor's initiation of criminal proceedings. Like a criminal prosecutor, a social worker who must exercise his discretion whether to initiate child dependency proceedings should not be constrained by the consequences in terms of his own potential liability. The social worker likewise works under serious constraints of time and information. The judicial system for determining child dependency issues would be adversely affected if the public officer charged with the initiation of dependency proceedings were concerned about resulting personal liability.

The Ninth Circuit also based its opinion upon this Court's decision in *Butz v. Economou,* 438 U.S. 478 (1978), extending the application of prosecutorial immunity beyond those officials engaged in traditional criminal prosecution. The Court noted that federal agency adjudication contains many of the same safeguards as are available in the judicial process. Likewise, a social worker's decision to initiate dependency proceedings leads to a judicial process in which similar safeguards are available as in criminal and administrative proceedings.

The Ninth Circuit's decision in this case was not inconsistent with this Court's recent decision in *Malley v. Briggs,* 475 U.S. —, 89 L.Ed.2d 271 (1986). Unlike the police officer in *Malley* for whom the common law recognized only a limited immunity, no common law principle existed regarding the application of immunity to social workers when section 1983 was adopted in 1871 since the

social work profession did not exist at that time. Also unlike the police officer, the social worker in this case was "intimately associated with the judicial phase" of the child dependency action in juvenile court, for it was within his sole discretion to investigate and initiate such proceedings.

The Ninth Circuit opinion is also consistent with the decision of other federal circuits which have passed on the question whether social workers are entitled to immunity for initiating child dependency proceedings. In *Kurzawa v. Mueller,* 732 F.2d 1456 (6th Cir. 1984) the Court of Appeal held that employees of the Michigan Department of Social Services were entitled to prosecutorial immunity. The Sixth Circuit stated that social workers responsible for the prosecution of child neglect and dependency petitions performed functions analogous to a prosecutor and, like a prosecutor, must be able to make decisions to move forward and be free from intimidation and harassment from dissatisfied parents. *Ibid.* at 1458.

In *Walden v. Wishengrad,* 745 F.2d 149 (2d Cir. 1984), the Court recognized prosecutorial immunity in the case of a County attorney who issued a subpoena in connection with prosecution of a child custody proceeding. The court cited with approval (*Ibid.* at 152) the case of *Whelehan v. County of Monroe,* 558 F.Supp. 1093 (W.D.N.Y. 1983) which held that a social service department employee was immune from liability under Section 1983 for initiating child protective proceedings, because initiating such proceedings is similar to the function of a prosecutor initiating criminal proceedings.

Another District Court, applying *Imbler, Butz,* and *Whelehan,* found prosecutorial immunity in the case of employees of the New Mexico Department of Social Services for their decision to apply for termination of parental rights. *Pepper v. Alexander,* 599 F.Supp.523 (D.N.M. 1984).

The decision of the Court of Appeal for the Second Circuit in *Duchesne v. Sugarman,* 566 F.2d 817 (1977), does not conflict with the Ninth Circuit decision below. In *Duchesne* the Second Circuit found that the initial decision by child welfare workers to remove children from their home without parental consent or a prior court order was permissible in response to an emergency situation but found a violation of due process where the state did not seek to obtain judicial ratification of its decision to retain custody of the children for 36 months, and only after the mother had initiated habeas corpus proceedings. *Ibid.* at 826-828. The *Duchesne* court permitted the defendants to assert a "qualified immunity/good faith" defense to this constitutional violation (*Ibid.* at 832). The Court did not discuss the applicability of prosecutorial immunity because the facts in that case did not warrant such an immunity: no "prosecution" was initiated. In contrast to the facts in *Duchesne,* our present case involves the application of immunity to a social worker only for acts connected with his initiation of dependency proceedings.

Those District Court cases cited by petitioner for the proposition that social workers are entitled only to qualified immunity are distinguishable. In *Czikalla v. Malloy,* 649 F.Supp.1212 (D.Colo. 1986) the District Court rejected the defense of prosecutorial immunity in the case of social workers who caused children to be removed from their par-

ents' home on allegedly insufficient evidence. The social workers were not engaged in initiating judicial proceedings as was involved in the present case. In *In Re Scott County Master Docket,* 618 F.Supp.1534 (D.Minn. 1985), the social worker sought prosecutorial immunity for assisting the County attorney in determining whether to initiate sex abuse prosecutions. In that case, the social worker's function was analogous to the function of a police officer who assists a prosecutor in the preparation of a criminal prosecution. By contrast the social worker in this case bore sole responsibility for determining whether to initiate dependency proceedings. In *Doe v. County of Suffolk,* 494 F. Supp. 179 (E.D. N.Y. 1980), state law provided only qualified immunity to the social worker; the District Court did not find that the social worker exercised independent discretion in deciding to initiate judicial proceedings. By contrast, respondent Haaland exercised independent discretion in initiating the dependency proceeding, and he was entitled to absolute immunity under state law.[1] And, as the District Court found (see Appendix 54a), Haaland enjoyed a broad discretion in carrying out his functions.

II

THE NINTH CIRCUIT DECISION GRANTING QUALIFIED IMMUNITY TO A SOCIAL WORKER ON FACTS PRESENTED IN THIS CASE WAS CONSISTENT WITH EXISTING LAW.

This Court has recognized that government officials are entitled to qualified immunity from civil rights damage

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1. A California public employee is not liable for injury caused by his instituting or prosecuting any judicial or administrative proceeding within the scope of his employment even if he acts maliciously and without probable cause. California Govt. C. § 821.6.

claims unless their special functions or constitutional status require recognition of immunity as a complete protection from suit. *Harlow v. Fitzgerald,* 457 U.S. 800, 806-807 (1982). This court has also recognized that insubstantial suits can be quickly terminated by resolution of the qualified immunity defense on a properly supported motion for summary judgment. *Ibid.* at 808, citing *Butz v. Economou,* supra, 438 U.S. at 507-508. This court defined qualified immunity by reference to a test of objective reasonableness: officials were entitled to the defense if they were performing discretionary functions which did not violate clearly established statutory or constitutional rights of which a reasonable person would have known. *Ibid.* at 817-818. This court admonished lower courts to a "firm application of the Federal Rules of Civil Procedure" to dispose of cases where the defense was properly raised. *Ibid.* at 819 (footnote 35).

The Ninth Circuit and the District Court below followed this admonition and properly disposed of this case on Haaland's motion for summary judgment. The Ninth Circuit found that respondent Haaland was entitled to qualified immunity for his action in ordering the petitioner father to stay away from his child's home until after a Juvenile Court hearing three days later. The finding of qualified immunity was appropriate on the facts presented to the trial court: Haaland was exercising discretionary authority granted by California law to social workers to remedy and prevent child abuse and neglect. The action he took did not violate any clearly established constitutional or statutory rights of petitioner father since it is indisputable that there was no physical interference with parental custody.

Moreover, Haaland's request to the father was coupled with advice to attend a hearing three days later affording petitioner an almost immediate due process opportunity to be heard. Even a complete physical separation of one parent and his child is constitutionally permissible under emergency conditions if a subsequent hearing is held. *Duchesne v. Sugarman,* supra.

III

THE NINTH CIRCUIT CORRECTLY DECIDED THAT RESPONDENTS ALLISON AND CROSSLEY WERE ENTITLED TO QUASI-JUDICIAL IMMUNITY.

Contrary to petitioner's assertion (Petition, page 33) the Ninth Circuit did not hold that respondents AGNES ALLISON and KAY CROSSLEY were entitled to quasi-judicial immunity "simply because they were court officers." The court below noted that the conduct alleged against ALLISON and CROSSLEY was not "clearly and completely outside the scope of their jurisdiction." *Demoran v. Witt,* 781 F.2d 155, 158 (9th Cir. 1986), citing *Stump v. Sparkman,* 435 U.S.349, 356-357 (1978). According to the petitioner's own allegations, respondents ALLISON and CROSSLEY were performing judicial functions by implementing court orders directing them to take action in their official capacities. Petitioners alleged that the California court ordered visitation to take place "under the supervision of the Conciliation Court and in the presence of a neutral adult to be selected by the Conciliation Court," and that ALLISON failed and refused to arrange such visitation. Petitioners also alleged that the California court ordered respondent CROSSLEY to "make a home visit to the [foster parents'] home and make a written report thereon," but that respondents visited the foster par-

ents' home and attempted to influence the foster parents against petitioners in violation of the order.

In performing their duties, respondents ALLISON and CROSSLEY were acting much like the probation officer in *Demoran v. Witt,* supra, who was alleged to have filed an erroneous probation report pursuant to court order. Like the probation officer in *Demoran,* respondents are entitled to quasi-judicial immunity. ALLISON and CROSSLEY acted as an arm of the state court in carrying out its orders in a pending action for dissolution of marriage; their actions were authorized by state law.[2] They were performing functions "integral to the judicial process," and they are therefore entitled to the protection from harassing damage suits which quasi-judicial immunity provides. The prospect of damage liability under Section 1983 would seriously erode the Conciliation Court's ability to carry out its judicial duties.

IV

ALLEGED FAILURE OF DISTRICT COURT TO LIBERALLY CONSTRUE COMPLAINT DID NOT DEPRIVE PETITIONERS OF FAIR HEARING.

Petitioners assert that the District Court's failure to liberally construe their complaint to allege substantive as well as procedural due process violations deprived them of a chance to prove their case. This argument misses the point: The Ninth Circuit decision affirming the District

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2. California Code of Civil Procedure §§ 1740, et seq., authorize family Conciliation Court counselors to provide such supervision in connection with the exercise of his jurisdiction as the judge of the family Conciliation Court may direct, and to make such investigations, reports and recommendations as the judge may direct.

Court judgment for respondents was based upon the application of recognized immunities to the facts alleged, regardless of the legal theories purportedly discoverable in petitioner's complaint.

The District Court, as an alternative ground for decision, under *Parratt v. Taylor,* 451 U.S. 527 (1981), held that petitioners failed to allege a deprivation of their liberty interests without due process because they were afforded opportunities for meaningful hearings shortly after the alleged deprivation. The District Court decision noted that the Ninth Circuit had granted a rehearing in *Haygood v. Younger,* 718 F.2d 1472, 9th Cir. 1983, but that a reversal of *Haygood* would not affect the disposition of this case in view of the court's determination that respondents were entitled to the benefit of the immunities (Appendix, Page 63a).

The Ninth Circuit did not rely on the District Court's alternative ground for decision, and in fact did not discuss the issue of adequate post-deprivation hearing or cite the cases of *Parratt v. Taylor,* supra, or *Haygood v. Younger,* supra. Thus, the alleged failure of the District Court to liberally construe petitioner's complaint had no effect on the Ninth Circuit decision. The Ninth Circuit correctly concluded that respondents were entitled to immunity and affirmed the District Court decision on that ground.

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CONCLUSION

The Ninth Circuit properly concluded that a social worker is entitled to prosecutorial immunity when exercising his independent judgment in determining whether to initiate child dependency proceedings. The Ninth Circuit also correctly concluded on the record before it that respondent Haaland was entitled to qualified immunity insofar as he allegedly ordered petitioners' father to temporarily stay away from his children pending a hearing three days later. The Ninth Circuit also correctly determined that the Conciliation Court counselors were entitled to quasi-judicial immunity in connection with their implementation of a state court order where the record established that they were not acting outside the scope of their jurisdiction. Since the petitioners have failed to demonstrate a special and important reason why this court should exercise its discretion to review the decision of the Ninth Circuit, the petition for Writ of Certiorari should be denied.

Respectfully submitted,

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